S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HERMAN J. ANDERSON and CHARLES R. SCALES JR.,	UNPUBLISHED December 13, 2012
Plaintiffs-Appellants,	
v	No. 306342 Wayne Circuit Court
HUGH M. DAVIS JR. and CONSTITUTIONAL LITIGATION ASSOCIATES PC,	LC No. 10-007084-CK
Defendants-Appellees.	

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs, Herman J. Anderson and Charles R. Scales Jr., appeal as of right from an order granting summary disposition in favor of defendants, Hugh M. Davis Jr. and Constitutional Litigation Associates PC, in plaintiffs' action to collect a portion of attorney fees awarded in a class action lawsuit. We affirm.

I. BASIC FACTS

The complaint alleged that Anderson filed a class action lawsuit in December 1998 on behalf of himself, his wife, and other unnamed parties. In September of the following year, Anderson began discussions with Davis over defendants' employment as co-counsel on the case. While those discussions were underway, plaintiffs moved to certify the class action, which was granted on June 16, 2000. Three days later, Anderson paid Davis a retainer fee of $1,500, but a retainer agreement was never agreed to. This Court subsequently reversed the order certifying the class action, finding that "[o]n the record before us, we are unable to determine whether clear error occurred because neither the court's conclusory statement on the record at the end of the hearing granting plaintiffs' motion to certify the class nor its written order of the same date certifying the class adequately address the requirements of MCR 3.501(A)(1)." *Anderson v Indian Village Manor Assoc, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 30, 2002 (Docket Nos. 228358 and 228360). At that point, Anderson and Davis got into a dispute over what the next course of action should be. Anderson wanted to appeal to the Michigan Supreme Court and Davis wanted to simply go back to the trial court and re-move for certification. Anderson then unilaterally sought leave to appeal to the Supreme Court, which was denied. *Anderson v Indian Village Manor Assoc, LLC,* 468 Mich 907; 661 NW2d 582, recon den

468 Mich 907 (2003).[1] Thereafter, Anderson withdrew as class representative and class co-counsel for the class action lawsuit. Additionally, Anderson sought to initiate a separate proceeding and attempted to have other class members join his separate action. For his part, Davis again sought and obtained class certification in the trial court and was confirmed as class counsel. The underlying class action lawsuit was ultimately settled in the class action plaintiffs' favor in the amount of $500,000 and defendants were awarded $150,000 as a class action attorney fee.

In the present action, plaintiffs claimed that their efforts significantly benefitted defendants and the class, which helped to facilitate settlement of the class action suit. As such, plaintiffs believed they were entitled to half of the attorney fees awarded and sought recovery under an implied contract. The trial court granted defendants summary disposition, denied plaintiffs' motion for summary disposition, and denied plaintiffs' motion to amend their complaint to include a breach of express contract claim. Plaintiffs now appeal as of right.

II. SUMMARY DISPOSITION

On appeal, plaintiffs argue that the trial court erred in granting defendants summary disposition. Plaintiffs point out that defendants' answer did not contain a statement of facts constituting the affirmative defenses listed, nor did defendants plead the affirmative defenses alleged in their motion for summary disposition, as required by MCR 2.111(F). Additionally, plaintiffs argue that defendants failed to show how they were prejudiced by the lapse of time between when plaintiffs' action accrued and when plaintiffs filed suit. Plaintiffs maintain that defendants acknowledged Anderson's efforts and intended to compensate him for his work; therefore, at a minimum, there was a question of fact as to implied contract and unjust enrichment. We disagree with plaintiffs' arguments and conclude that the trial court properly granted defendants summary disposition.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition pursuant to MCR 2.116(C)(8) is appropriate where "[t]he opposing party has failed to state a claim on which relief can be granted." Therefore, a motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "The motion should be granted if no factual development could possibly justify recovery." *Id.* In contrast, a motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden*, 461 Mich at 120. A reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties

[1] In denying leave, our Supreme Court noted, "[w]e further find that plaintiff's application for leave to appeal to this Court constitutes a vexatious proceeding under MCR 7.316(D)(1), and we ORDER that plaintiffs pay to defendants actual damages attributable to proceedings in this Court."

and, viewing that evidence in the light most favorable to the nonmoving party, determine whether there is a genuine issue of material fact for trial. *Id.*

B. AFFIRMATIVE DEFENSES

Plaintiffs argue that the trial court erred by granting summary disposition in defendants favor where defendants failed to plead affirmative defenses or supply a factual basis for affirmative defenses properly raised. We disagree.

The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense. *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). Additionally, the assertion of an affirmative defense must include the facts supporting the defense and the party asserting an affirmative defense has the burden of providing evidence to support the defense. MCR 2.111(F)(3); *AG ex rel DEQ v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). However, an affirmative defense does not controvert the plaintiff's prima facie case; it concedes that the plaintiff has a cause of action but otherwise denies relief to the plaintiff. *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). It is a defense that by reason of an affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, or that, if not raised in the pleading, would be likely to take the adverse party by surprise. MCR 2.111(F)(3); *McCracken v Detroit*, 291 Mich App 522, 528; 806 NW2d 337 (2011). The defense of failure to state a claim upon which relief can be granted is not waived by the failure to plead as required, MCR 2.111(F)(2); *McCracken*, 291 Mich App at 527.

In arguing that the trial court erred by granting summary disposition in defendants favor where defendants failed to plead affirmative defenses, plaintiffs conflate the procedural distinction between a motion for summary disposition for failure to state a claim and the pleading of affirmative defenses. As discussed more fully below, defendants were entitled to summary disposition in this case based on plaintiffs' failure to state a viable claim and the absence of a genuine issue of material fact. Defendants premised their motion for summary disposition on the inadequacy of plaintiffs' pleadings and their failure to establish a factual predicate for their claims. Defendants never conceded plaintiffs' establishment of a prima facie case for any cause of action pleaded in their complaint. Accordingly, any alleged failure to raise an affirmative defense did not preclude summary disposition in defendants' favor.

C. LACHES

Additionally, defendants did, in fact, affirmatively plead laches. Laches is an equitable affirmative defense "based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff." *AG v Powerpick Players' Club of Mich, LLC,* 287 Mich App 13, 51; 783 NW2d 515 (2010). It is caused by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. *Id*. The mere passage of time does not constitute laches; rather, laches applies when there has been an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to the party asserting laches. *Dep't of Pub Health v Rivergate Manor,* 452 Mich 495, 507; 550 NW2d 515 (1996); *Wayne County v Wayne County Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005).

Plaintiffs did not file their complaint until June 21, 2010, even though the latest the claim accrued was when the final order dismissing the underlying class action lawsuit was entered on January 18, 2005. Plaintiffs offered no reasonable explanation for the delay other than Anderson's depression. But, by his own admission, Anderson was actively engaged in the practice of law during that time and even sought Davis' services in an unrelated class action suit in 2005. In the unrelated fire loss litigation, Anderson had once again sought defendants' assistance as co-counsel. However, the parties could not agree to the terms and the offer to act as co-counsel was withdrawn in 2007. The present lawsuit was filed three years later. Incredibly, plaintiffs asserted that "this litigation could have been avoided had the Davis and CLA Defendants accepted Anderson's invitation to join the fire loss litigation, as co-counsel." Plaintiffs sat on this cause of action for a number of years and, what is worse, failed to take affirmative steps to resolve the issue when they had an opportunity to do so before the Special Master in the underlying class action lawsuit.

The trial court did not state how defendants' position had materially changed due to the passage of time, but as discussed below, even if the trial court erred in granting summary disposition under the laches doctrine, defendants would have still been entitled to summary disposition as a matter of law where plaintiffs failed to state a claim upon which relief could be granted and there was no genuine issue of material fact.

D. FAILURE TO STATE A CLAIM/NO GENUINE ISSUE OF MATERIAL FACT

Plaintiffs brought this action on a theory of implied contract. A claim for unjust enrichment or quantum meruit is the equitable counterpart of a legal claim for breach of contract. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). Where an explicit contract does not exist, an implied contract may arise from the parties' conduct, language, or other circumstances that evidence an intent to contract. *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). A contract implied in law does not require a meeting of the minds, as does a contract implied by fact, but is imposed by operation of law in order to prevent inequity; thus, a contract may be inferred even if no contract was intended. *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949).

> A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. [*In re Lewis Estate*, 168 Mich App 70, 74–75; 423 NW2d 600 (citations omitted).]

The equitable theory of unjust enrichment is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party. *Belle Isle Grill Corp. v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Recovery in quantum meruit is appropriate if the evidence establishes that a defendant received a benefit from the plaintiff and it would be inequitable to allow the defendant to retain the benefits conferred without compensating the plaintiff. *Morris Pumps v Centerline Piping*, Inc, 273 Mich App 187, 195; 729 NW2d 898 (2006). "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

As noted above, while Anderson was initially successful in seeking class certification, this Court reversed the order certifying the class. At that point, Anderson and Davis got into a dispute over what the next course of action should be. Anderson wanted to appeal to the Michigan Supreme Court and Davis wanted to simply go back to the trial court and re-move for certification. Anderson then unilaterally sought leave to the Supreme Court, which was denied. Anderson was also sanctioned for filing a vexatious appeal. Thereafter, Anderson withdrew as class representative and class co-counsel for the class action lawsuit. Additionally, Anderson sought to initiate a separate proceeding and attempted to have other class members join his separate action. For his part, Davis sought and obtained class certification and was confirmed as class counsel.

If anything, Anderson's behavior was an impediment to the ultimate settlement agreement. Defendants successfully settled the case in spite of, not because of, plaintiffs' actions, as stated in Davis's affidavit:

> 21. . . .[During negotiations with class action defendants] I was still fighting off Anderson and attempting to maintain a large enough pool of the former tenants to make it worthwhile for Defendants to settle. The fact that Defendants were still going to have to litigate with Anderson and his rump group of tenants had a depressing effect on the value of the case.
>
> 22. When it was clear that we could not get more than $750,000 from the Defendants, the law firm agreed to take a 20% contingency as its fee in order to enhance the offer to the class members.
>
> 23. The acrimony between Anderson, me and the class continued during the opt-in/opt-out period. The special master had the ability to hear these disputes, which he did. Anderson had an opportunity to present his claims to the special master, which he did not.

Anderson does not deny that he attempted to have the class members abandon Davis. Nor does Anderson deny that he declined to mediate the issue of attorney fees before the Special Master in the underlying class action. There is simply nothing on the record to support Anderson's claim that he is entitled to any portion of the fees recovered in the settlement. There is no evidence to support plaintiffs' claim that defendants were unjustly enriched at plaintiffs' expense. In fact, plaintiffs conferred no benefit to defendants or the class. Any benefits previously conferred by Anderson's prior representation had been undone. In fact, at the time of Anderson's resignation, there was no class certification and Anderson's behavior sought to divide the class. Therefore, because there is no genuine issue of material fact, the trial court properly granted defendants summary disposition.

III. MOTION FOR LEAVE TO AMEND THE COMPLAINT

Plaintiffs argue that the trial court erred in denying their motion for leave to amend their complaint to include a cause of action for breach of express contract. We disagree and conclude that the trial court did not abuse its discretion in denying plaintiffs' motion to amend their

complaint where such an amendment would have been futile. See *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004).

MCR 2.116(I)(5) provides that if a trial court grants summary disposition and "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." It is clear that such an amendment would have been futile in this case.

To establish a breach of contract, a plaintiff must first establish the elements of a contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract requires: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989).

The only evidence upon which plaintiffs rely is a letter dated October 25, 2004, from Davis to Special Master Michael L. Stacey, who was assisting in the management of the class action litigation. The letter contained the following statement:

> There is another issue which undersigned counsel and Anderson have agreed to submit to the Special Master, but it is not necessary for it to be resolved on the 27th – the issue of fees. The settlement agreement called for the payment of one hundred fifty thousand ($150,000) dollars in fees (twenty percent of the gross recovery) to Davis and his firm for compensation for all work undertaken in this matter since 2000 (including expenses) and all work required for the finalization of the agreement, including the ongoing proceedings. Anderson objected and argued that, if the settlement was going through, he was entitled to fees for the work performed by him, Trish Arndt and Charles Scales from 1998 forward in initiating the action, defeating the challenge to the constitutionality of the ordinance, obtaining the class certification and working on the appeal, either as a separate award from the court or as a part of the fees awarded under the agreement. Davis agrees that Anderson's costs through October 2003 should be paid and that whether a portion of the $150,000 in fees awarded under the settlement agreement should be paid to Anderson could be submitted to the Special Master.

First and most critically, there was no mutual assent or meeting of the minds. "Mutual assent exists where each party makes a promise or begins or renders performance." *Borg-Warner Acceptance Corp v Dep't of State*, 169 Mich App 587, 592; 426 NW2d 717 (1988), rev'd on other grounds 433 Mich 16 (1989). Here, a letter from Davis to a *third party* could not possibly form the basis of an agreement between Davis and Anderson. Additionally, there is absolutely nothing in the preceding paragraph disclosing a promise to pay plaintiffs. At most it is an acknowledgement of a potential dispute. "Mere discussions and negotiations cannot be a substitute for the formal requirements of a contract." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

Second, there was no consideration. Anderson did not promise to do or refrain from doing anything; instead, Anderson expects compensation for work he rendered between 1998 and 2000. However, past consideration does not constitute legal consideration. *Shirey v Camden*, 314 Mich 128, 138; 22 NW2d 98 (1946). Given the lack of mutuality of assent and lack of consideration, a breach of contract claim was not viable. Accordingly, trial court did not abuse its discretion in denying the motion for leave to file an amended complaint where the amendment would have been futile.

Affirmed. As the prevailing party, defendants may tax costs. MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

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M. J. KELLY, J. (*concurring*).

I concur in the result only.

/s/ Michael J. Kelly